COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1527 **Cir. Ct. No. 2000CV961**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

BERNER CHEESE CORPORATION N/K/A BERNER FOODS CORPORATION,

PLAINTIFF-APPELLANT,

V.

LYLE A. KRUG, PLAGER, HASTING & KRUG, LTD. AND ISBA MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Berner Cheese Corporation, n/k/a Berner Foods Corporation, appeals a judgment dismissing its claims for breach of fiduciary duty and punitive damages against attorney Lyle A. Krug, his insurer, and his law firm

Plager, Hasting and Krug, Ltd. (collectively, "Krug"), for actions surrounding Berner's settlement of litigation with Dairy Source, Incorporated (DSI). Berner argues that transactions in which an attorney benefits financially at the expense of the client are presumed to be the product of undue influence, and that it presented credible evidence that Krug benefited at Berner's expense from the DSI settlement. Berner also argues the jury should have considered punitive damages because there is credible evidence that Krug's actions intentionally disregarded its rights. Because Berner failed to establish the necessary requirements for either a breach of fiduciary duty or punitive damages, we affirm the circuit court's judgment.

BACKGROUND

¶2 This litigation began with a claim by Brennan, Steil, Basting, and MacDougall, S.C. (Brennan), for unpaid attorney fees incurred by Berner and its owners, the Kneubuehls. Berner incurred these fees in litigation against DSI and its owners, Tony and Rose Steinmann. Berner counterclaimed against Brennan, two of its attorneys, and its insurer, and made third-party claims against Krug. Berner eventually settled with Brennan. Thus, the only remaining litigants in this appeal are Berner and Krug.

¶3 Due to the length and complexity of this appeal, we break the background into three parts in order to better understand the issues. First, we discuss the litigation underlying this appeal. Next, we discuss the present litigation including the first appeal to this court. Finally, we discuss the events that occurred following remand leading to the current appeal.

A. Underlying Litigation

¶4 The underlying litigation began with a dispute between Berner and DSI. Berner, an Illinois corporation, manufactures and sells cheese. DSI, located in Delevan, Wisconsin, is a cheese brokerage and distribution company owned by Rose Steinmann, whose husband Tony was Berner's vice president of sales and marketing. Tony Steinmann (Steinmann) worked out of DSI's office, keeping Berner records and equipment there. DSI leased the office, but Berner paid half the rent and shared support staff and computer equipment with DSI.

¶5 Steinmann was responsible for Berner's processed cheese division, on which Berner spent millions of dollars to develop and is the company's future. Steinmann had access to all of Berner's customers, the only customer list, and Berner's processed cheese production formulas. Wanting to protect this proprietary information, Berner attempted to negotiate an employment contract with Steinmann. The negotiations failed when Berner would not give Steinmann an ownership interest in Berner; Steinmann then resigned effective April 5, 1999. Following Steinmann's resignation, Berner became even more concerned about protecting its information.

¶6 To that end, Berner met with Krug, its corporate counsel, about retrieving its information from Steinmann and ensuring neither he nor DSI used this information.[1] Krug developed a self-help plan for an entry into DSI's office to recover the documents with the aid of DSI employees. On April 5, Krug sent a letter to Berner detailing its options to recover its property. The letter also laid out

[1] According to Berner, Steinmann had threatened to use this information to go into the processed cheese business for himself and compete with Berner.

the risks of each option. Berner contends Krug assured it that self-help was legal and the best option, although some risk was discussed. In addition to the self-help plan, Berner intended to file a replevin action for any documents not recovered and retained Brennan to file that action.

¶7 On April 12, several Berner employees and agents removed approximately thirty-three boxes of documents from DSI's offices. On April 13, in Walworth County, Brennan filed Berner's replevin claim for the unrecovered items. Berner also obtained an ex parte restraining order, without informing the court of its self-help actions. At the hearing on the temporary restraining order, DSI claimed Berner had engaged in criminal conduct, theft of documents, and breaking and entering. Without a ruling on the temporary restraining order, the parties negotiated a mutual consent restraining order.

¶8 On May 1, 1999, Berner filed a voluntary motion to dismiss the Walworth County replevin action and then filed suit against DSI in federal court. In response, DSI filed a motion for attorney fees and costs in the Walworth County replevin action, claiming the suit had been frivolous. It also filed a new action in Walworth County against Berner, asserting claims for conversion, tortuous interference with contract, fraud, replevin, breach of fiduciary duty of loyalty, breach of good faith in fair dealing, and defamation. In May 1999, Berner suggested settling all claims for a $300,000 payment to DSI, but Krug allegedly discouraged the idea because it might show weakness. In any event, Berner continued litigating its claims.

¶9 Although Brennan served as Berner's defense counsel, Berner claims Krug oversaw the litigation and advised Brennan on strategy. Brennan's defense strategy was to show that Berner followed Krug's legal advice. During

trial preparation, Krug realized potentially damaging notes from the planning meetings were not protected by attorney-client privilege because a third party was present. In November 1999, DSI began deposing Krug and threatened to sue him as well. On March 17, 2000, DSI filed a motion to amend its pleadings to add Krug as a defendant. Berner claims it was never alerted to this possibility, although Krug had requested indemnification from Berner.

¶10 Adding Krug as a defendant concerned Brennan because Brennan considered Krug a poor witness. Additionally, two courts had determined Krug's notes were not privileged and had to be released. Therefore, two attorneys from Brennan met with Berner to discuss settling. The attorneys claim they told Berner that the litigation was not going well, that the suit would be expensive to try, and that Berner could lose. Berner claims Brennan's settlement pressure represented an "abrupt change" in Brennan's take on the litigation brought about by Krug's influence and Brennan's fear that it too might be sued.

¶11 On April 10, 2000, the Walworth County court ruled Krug could be joined as a defendant in DSI's lawsuit. Following Krug's joinder, Berner settled all pending litigation with DSI for $1.35 million. Berner and DSI agreed to the settlement figure without their attorneys present. Berner, DSI, Krug, and others signed the settlement agreement, which included a release for Krug and the other attorneys in the action. During the settlement process, Berner asked Brennan to demand $200,000 from Krug to go towards the settlement; Krug refused to contribute to the settlement.

B. Present Litigation

¶12 Following the settlement, Brennan filed the present action against Berner for unpaid attorney fees. Berner counterclaimed against Brennan and filed

a third-party complaint against Krug, alleging legal malpractice, breach of fiduciary duty, implied indemnity, and civil conspiracy. Berner claimed Krug did not fully advise it of the risks of the self-help procedure. Berner also claimed Krug had a conflict of interest, improperly influencing settlement discussions to avoid his own liability without regard for Berner's interests. Krug moved for summary judgment, arguing Berner's case was fundamentally flawed absent expert testimony on whether Krug's alleged negligence caused Berner damages. Berner also filed for summary judgment, claiming Krug violated his fiduciary duty as a matter of law.

¶13 To support its claim, Berner produced the testimony of Peter Rofes, a professor at Marquette University Law School. Rofes testified Krug's conduct fell below the standard of care. However, he expressed no opinion as to whether Berner paid more to settle the case than would have been necessary had it not indemnified Krug. Krug argued Rofes's testimony did not establish causation. The circuit court agreed.

¶14 The court also concluded Berner's breach of fiduciary duty claim was a legal duplication of its malpractice claim. The court determined the fiduciary duty claim, as well as claims of implied indemnity and civil conspiracy, suffered from the same lack of proof as the malpractice claim. The court denied Berner's motion for summary judgment and granted Krug's motion for summary judgment, dismissing Berner's claims.

¶15 Berner appealed those judgments to this court. We held Berner's expert provided sufficient testimony to avoid summary judgment on Berner's legal malpractice claim. We also held the breach of fiduciary duty and legal malpractice were not identical. We then remanded the case for further

proceedings. *See* ***Brennan, Steil, Basting & MacDougall, S.C. v. Berner Cheese Corp.***, Nos. 2003AP919, 2003AP2522, unpublished slip op. (Wis. Ct App. May 25, 2004).

C. On Remand

¶16 On remand, Berner's claims were tried to a jury. Berner based its claim of a breach of a fiduciary duty on Krug's conduct regarding the DSI settlement, particularly his alleged pressure on Berner to indemnify him. At the end of the trial, the court denied Berner's request to instruct the jury on its breach of fiduciary duty claim against Krug. The court reasoned:

> I do not believe that there is any evidence of a benefit which Lyle Krug or Plager, Hasting and Krug received which was an expense of the plaintiff.
>
> There are two elements [of a breach of fiduciary duty claim]. One is did they receive a benefit? And the other was that benefit at the expense of the plaintiff?
>
> ….
>
> There is no evidence that Berner Foods paid any additional amount in settlement because of the need to avoid a cost of defense by Lyle Krug.

The court also denied Berner's request to submit the question of punitive damages to the jury because it found Krug did not know his conduct would "create a strong possibility of substantial harm to Berner." The jury was instructed on Berner's legal malpractice claim.

¶17 The jury found both Krug and Berner negligent and that both parties' negligence caused damage. The jury found Krug 60% negligent and Berner 40% negligent. The jury awarded $850,000 in damages. However, as a result of agreed

upon set-offs, the amount of damages awarded was $0.[2] Berner now appeals the circuit court's dismissal of its breach of fiduciary duty and punitive damage claims.

DISCUSSION

¶18 A circuit court may only dismiss a claim if "it finds, as a matter of law, that no jury could disagree on the proper facts or the inferences to be drawn therefrom; and that there is no credible evidence to support a verdict for the plaintiff." ***Household Utilities, Inc. v. Andrews Co.***, 71 Wis. 2d 17, 24, 236 N.W.2d 663 (1976). We "will not overturn a circuit court's decision to dismiss for insufficient evidence unless the record reveals that it was 'clearly wrong.' A circuit court is 'clearly wrong' when it grants a motion to dismiss despite the existence of 'any credible evidence' to support the claim." ***Haase v. Badger Mining Corp.***, 2004 WI 97, ¶17, 274 Wis. 2d 143, 682 N.W.2d 389. The current appeal presents two issues: (1) whether the circuit court appropriately dismissed Berner's fiduciary duty claim and (2) whether the circuit court appropriately dismissed Berner's prayer for punitive damages. We hold the court appropriately dismissed both of Berner's claims.

A. Breach of Duty

¶19 The first issue we address is whether the circuit court appropriately dismissed Berner's breach of fiduciary duty claim because Berner did not establish it was harmed by indemnifying Krug. Both parties appear to agree on the applicable standard for whether an attorney breaches the fiduciary duty of loyalty

[2] The record does not indicate the source, amount or nature of the agreed upon set-offs.

in the context of attorney-client transactions. The parties dispute who has the burden in proving whether Berner was damaged as a result of indemnifying Krug. Additionally, the parties dispute whether there is credible evidence that Berner was harmed by indemnifying Krug. We hold that Berner bears the burden of establishing the extent to which it was harmed and that Berner did not present credible evidence that it was harmed by indemnifying Krug.

¶20 Attorneys owe their clients a fiduciary duty of loyalty. ***Zastrow v. Journal Commc'ns, Inc.***, 2006 WI 72, ¶30, 291 Wis. 2d 426, 718 N.W.2d 51. An attorney may breach this duty of loyalty by entering into a transaction with a client without fully informing the client of the risks that the transaction will benefit the attorney and potentially disadvantage the client. ***Id.*** In their briefs, both parties agree an attorney breaches his duty of loyalty by unduly influencing the client when there is a transaction between the attorney and the client, and the attorney benefited at the expense of the client. The supreme court's discussion of an attorney's duty to his or her client in ***Zastrow*** supports both parties' assertion of when the presumption of undue influence arises. *See* ***id.***

¶21 As to burden, Berner agrees the presumption of undue influence arises when the attorney benefits at the expense of the client in a transaction. Berner then argues the burden is on Krug to demonstrate that the settlement was not at its expense. However, the party seeking the benefit of the presumption bears the burden of establishing that presumption. *See, e.g.*, ***In re Faulk's Will***, 246 Wis. 319, 345-46, 17 N.W.2d 423 (1945) (noting that in the context of estates, Wisconsin law requires plaintiffs to make a prima facie case for undue influence). As noted above, the parties agree the applicable standard for the presumption of undue influence. Therefore, Berner bears the burden of establishing both that

Berner entered into a transaction with Krug and that Krug benefited at Berner's expense.

¶22 We next address whether Berner presented credible evidence to establish a claim for undue influence, entitling it to a presumption of undue influence. Krug argues the DSI settlement was not a transaction that could implicate a breach of loyalty because he was not part of the settlement process. Berner argues Krug influenced the settlement and was therefore part of the transaction. Other than general authorities on attorney conduct involving direct transactions between attorney and client, Berner does not cite authority directly supporting its argument that a settlement from which an attorney benefits, but has not negotiated, is a transaction implicated by this area of law. In any event, we limit our consideration to whether Berner presented credible evidence that it was harmed by indemnifying Krug because this issue is dispositive of this appeal.

¶23 Berner asserts it presented four credible pieces of evidence that it was harmed by the settlement. First, Berner argues it is entitled to the presumption that the entire settlement constitutes its damages. Second, Berner argues that, even if it is not entitled to this presumption, Krug talked it out of settling with DSI only to pressure it to settle when he faced liability. Third, Berner asserts the settlement extinguished liability for actions it took in reliance on Krug's advice. Finally, Berner states it would have been able to seek forfeiture of attorney fees it paid Krug in connection with the DSI litigation.

¶24 None of the four pieces of evidence are credible evidence Berner was harmed because they do not show Berner paid more to settle the case by indemnifying Krug then it would have paid had it not. Berner's first asserted piece of credible evidence is a circular argument asking for a presumption to arise

based on the very presumption it must prove. Berner's second asserted piece of credible evidence only shows at a certain stage in the litigation a tactical error may have been made. Berner's third asserted piece of credible evidence only shows it might have avoided litigation if it did not follow Krug's advice. As to Berner's final asserted piece of credible evidence, it does not present evidence that the legal fees Krug charged were solely for Krug's benefit. Therefore, Berner failed to show it was harmed by Krug.

¶25 We hold Berner did not present credible evidence to support its breach of loyalty claim because of undue influence to settle the DSI litigation. Berner's evidence establishes it did not get the result it was looking for, but it does not establish it was harmed by indemnifying Krug. Without evidence showing that Berner paid more in the settlement because of Krug's indemnification included in the settlement, it has failed to show how it was harmed. Therefore, we affirm the circuit court's dismissal of Berner's breach of fiduciary duty claim.

B. Punitive Damages

¶26 Next, we turn to whether the court appropriately dismissed Berner's claim for punitive damages. WISCONSIN STAT. § 895.85(3)[3] governs the conduct to which punitive damages may apply. A "plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

plaintiff or in an intentional disregard of the rights of the plaintiff." ***Id.***[4] Berner limits its claim for punitive damages to whether Krug acted in an intentional disregard of its rights. We hold Berner is not entitled to punitive damages.

¶27 Punitive damages are appropriate if a defendant acts in an intentional disregard of the rights of the plaintiff, which for the purposes of WIS. STAT. § 895.85(3), means the defendant acts with a purpose to disregard the plaintiff's rights or is aware that his or her actions are substantially certain to result in the plaintiff's rights being disregarded. ***Strenke v. Hogner***, 2005 WI 25, ¶19, 279 Wis. 2d 52, 694 N.W.2d 296 (overruling ***Wischer v. Mitsubishi Heavy Indus. Am., Inc.***, 2003 WI App 202, 267 Wis. 2d 638, 673 N.W.2d 303, *rev'd*, 2005 WI 26, 279 Wis. 2d 4, 694 N.W.2d 320). Thus, to maintain its claim for punitive damages, Berner must show Krug acted with the purpose to disregard its rights or that he was aware his actions were substantially certain to result in Berner's rights being disregarded.

¶28 Berner asserts it presented credible evidence demonstrating Krug intentionally disregarded its rights. Berner points to deposition testimony of Krug's partner Hastings that he did not think Krug should pressure Berner to settle. Berner also points to Krug's testimony that he felt it would have been wrong for an attorney to pressure Berner to settle. Finally, Berner argues the "serial billing" for services that benefited only Krug also warrant punitive

[4] Krug cites 735 ILL. COMP. STAT. 5/2-1115 for the proposition that Illinois law does not allow punitive damages for legal malpractice and argues it should apply to this case. However, in ***Marten Transport, Ltd. v. Rural Mut. Ins. Co.***, 198 Wis. 2d 738, 745, 543 N.W.2d 541 (Ct. App. 1995), we held "the law of the forum … governs all matters relating to the remedy, the conduct of the trial, and the rules of evidence." Because punitive damages are a remedy and the forum is Wisconsin, Wisconsin law applies to the remedies available in this case.

damages. The circuit court held this evidence established Krug was aware his actions did not meet his duty of care; but refused to put the claim for punitive damages to the jury because the evidence did not demonstrate Krug's purpose was to disregard Berner's rights nor did the evidence show he was aware his actions were substantially certain to result in Berner's rights being disregarded.

¶29 While the question of whether Krug's conduct could give rise to punitive damages is a close one, we decline to address this question because Berner is not able to recover punitive damages. Even if Berner had presented enough evidence to instruct the jury on punitive damages, Berner still is not entitled to reversal on this point. A prerequisite to punitive damages is an award and recovery of actual or compensatory damages. ***Tucker v. Marcus***, 142 Wis. 2d 425, 438-39, 418 N.W.2d 818 (1988). Because we affirmed the dismissal of its breach of fiduciary duty claim and no actual or compensatory damages were recovered for Krug's legal malpractice, Berner could not recover punitive damages even if we were to disagree with the circuit court's conclusion. *See* ***id***.

CONCLUSION

¶30 The circuit court correctly dismissed Berner's fiduciary duty claim because Berner bore the burden of presenting credible evidence that it was harmed by indemnifying Krug and it failed to meet its burden. Furthermore, Berner is not entitled to reversal on the punitive damages claim because no actual or compensatory damages were awarded and recovered. Therefore, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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